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INQUIRY INTO ALL THE FACTS OF AN ALLEGED CONTEMPT IN THE FACE OF THE COURT.

In Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. ed. 1117, Justice Miller, in a habeas corpus case, claiming release from imprisonment for contempt, said: "There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error or appeal to this court. * * * This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors." Then he states that when an attempt is made by a court to punish for contempt in refusing to obey an order the court is alleged to have no authority to make, a petition in habeas corpus may make "inquiry into the cause of the restraint of his liberty."

Judge Taft in Ex parte Irvine, 74 Fed. 954, applying this rule, held that, though there might be appeal by one from an order adjudging him guilty of contempt, yet when habeas corpus is resorted to, the authority of the court to impose the punishment could be inquired into in a collateral way.

A recent decision by Missouri Supreme Court, in Ex parte Howell, 200 S. W. 65, in speaking of the claim of absolute verity of a judgment in direct contempt, says:

"While the older authorities in other jurisdictions, from which the text writers deduce statements of principles, unqualifiedly apply the general rule of immunity from collateral attack to judgments of the character here in question, we hold otherwise. Here one convicted of direct attempt, in seeking relief through habeas corpus, is not limited to an inquiry as to the convicting court's jurisdiction; but, if the truth of the findings upon which the judgment is based is denied in the petitioner's reply, inquiry may be made in regard thereto. To this extent we have, as has been done elsewhere, brushed aside the hard and fast rule which heretofore hedged about judgments for direct or criminal contempt, rendering them immune from attack, and have authorized an inquiry to test the truth of their findings."

This principle ought ever to have been deemed sound and in a general, broad way even the older cases in American law very possibly never departed therefrom. It hardly is conceivable, that at any time in our history it has been true that a court of general jurisdiction could upon some claim having no pretense to foundation in fact, fine or commit a citizen for contempt, and he have no right to inquire into the authority of the court's action. But we hardly believe it to be true, that such inquiry should go any further than to ascertain whether there was a bald assertion of authority that does not exist. If facts are in dispute, or there may be different inferences in regard to facts, there is no reason to fear any denial of the right to enforce contempt, by courts in the exercise of their powers.

Thus, while we approve of the finding in the Howell case, that no contempt was committed, yet this is so because nothing was shown in the order making recital of the facts that showed any justification for the order by the court. It shows that counsel made an application they had the undoubted right to make and claiming that under the statute the very making of this application ousted the court of jurisdiction to proceed in the cause before it, they declined to continue in the case or to make any motion for a continuance of the cause to a later day. Without finding that they acted contemptuously or in any way as wanting in deference, the court yet said they "by their words, acts and gestures, offer and commit willful contempt in the

immediate view, presence and hearing of the court."

Conceding that the making of the motion ousted the court of jurisdiction and counsel announcing that they had nothing further to say of itself amounted to no contempt whatever, could it not be shown that nevertheless the making of the motion and the announcement of counsel having nothing further to say when the motion had been denied, was in a contemptuous and insulting manner? And, if the court deemed the manner contemptuous and insulting, could its apprehension or view of the matter be overruled in habeas corpus?

The Supreme Court appears to think that the fact that the court received the motion, caused it to be filed and then denied it, shows it was not offered in a contemptuous way, or in a manner not deferential. But this does not follow. A court may entertain a legal motion and perhaps should, though it be offered in a disrespectful manner, and then punish for contemptuousness in the making. Nor does the fact that counsel stood mute, as the order said they did when called on to make further announcement, show that this standing mute was not disrespectful or lacking in deference.

It appears that one of the counsel said: "If it is necessary for somebody to go to jail in order that the State may get justice in this case, I am ready to go," but for this the court only cautioned him to "be careful or I will fine you again." It is easy to see that what counsel said might be thought to be a contemptuous remark. The Supreme Court, however, said that the court's remark "did not constitute an illuminating illustration of that cool judicial equipoise which should characterize the conduct of a judge assessing punishment against counsel for an infraction of the court's dignity." The Supreme Court possibly might have better inquired whether what counsel said showed contempt. It was said while the court was still considering the matter, and even, if the case had been over with, counsel, as a mere bystander, could have been punished for interjecting such an observation.

As stated we agree with the court's declaration that in habeas corpus inquiry may be made into exercise of pretended authority to punish for contempt, yet there seems here suggestion that the Supreme Court of Missouri failed possibly to inquire whether the offended court really punished for making the motion for change of venue or for standing mute after this motion was denied, or whether the punishment was imposed for contemptuousness in the making of the motion or in the standing mute. It is possible to see that these things, according to the manner of their being done or performed, easily could amount to contempt, and the right to administer a quick punishment as to acts *in facie curiae*, carries some presumption in favor of the eyes and ears of the punishing court seeing or hearing what was done. Indeed, contempt may consist of outbursts of temper or of veiled sarcasm or of gesture or attitude, or of sitting down when one should be standing up. Deference or lack of deference may be shown in a variety of ways, and to the court administering justice in a summary way much latitude in discretion should be allowed.

NOTES OF IMPORTANT DECISIONS.

PUBLIC POLICY—AGREEMENT NOT TO MARRY DURING LIFE OF DONOR INCIDENTAL.—In Fletcher v. Osborn, 118 N. E. 446, decided by Supreme Court of Illinois, where a contract by one to give land to another in consideration of service to be rendered during the lifetime of the former has been fully executed, a clause providing that the latter shall remain single during the period of service is to be deemed as merely an incident to the main object, the employe actually remaining single.

The Court said: "Appellant and deceased did not contract expressly for a restraint upon the marriage of appellant, but they were contracting for the services of appellant in caring for deceased and in supervising the management of his property. The provision that appellant

should remain unmarried during this period of service was merely an incident to the main object and purpose of the contract." In support of this holding there is cited King v. King, 63 Ohio St. 363, 59 N. E. 111, 52, L. R. A. 157, 81 Am. St. Rep. 635. Authorities also were cited of latitude allowed testators where perpetual celibacy is not imposed, as for say, until beneficiary shall reach his or her majority, and it has been ruled that where services have been accepted and more mischief would result from denying than permitting recovery, the void provision will not be regarded.

It seems to us that there ought to be some accommodation, in an equitable way, at least, in such a contract. Contractual provisions of this kind in the securing of services ought not to have the same rigidity of application to them as in wills. There is no presumption that the parties intend to obtain what is of value and be obligated in no way to account therefor upon some principle of forfeiture, unless the contract is clear to that effect.

NEGLIGENCE — ACTS IN EMERGENCY SUBSTITUTE FOR EFFICIENT COURSE.—In Kelch v. National Contract Co., 199 S. W. 796, decided by Kentucky Court of Appeals, there was a claim for alleged negligence in not immediately stopping machinery so that the life of an employe, who had fallen into a chute and was thereby carried into a river could have been saved.

The evidence shows that defendant was engaged in building a dam in the Ohio river and in connection therewith a coffer dam, and connecting the two was a sluiceway or chute, into which pumps emptied water. This water ran out in a swift current into which decedent fell and was carried out in the chute to the river some twenty feet below where he was drowned. Immediately one of the employes holloed to the engineer working the pumps supplying the chute to shut off the machinery, but the running water and the operation of the machinery prevented his being heard. As soon as the engineer could be made to hear he stopped the pumps, but he was not efficiently notified until after the foreman ordering the machinery stopped, took time to pick up a spike pole near the machinery to extend same to decedent struggling in the river. Decedent sank for the last time within two minutes from the time he fell into the chute.

Whether, if the foreman had given immediate notice, so as to stop the machinery, decedent might have been rescued does not very clearly appear. He was being borne down by water in the chute and this would have occurred though the water had been cut off immediately, and his being in the river when the cessation of the current through the chute hardly could have made any difference. At all events, however, the court speaks of the stop to pick up the spike pole as an act in an emergency, and as not proving the best way to effect a rescue. The court said: "They (the servants) believed that they had been heard when they halloed for the pump to be stopped. There was no time to be lost in waiting to see; what deceased most immediately needed was something upon which he could rely to prevent his sinking and to assist him in getting to a place of safety. The only available thing was procured and every effort made to accomplish with it the purpose intended. When it was found that such efforts were fruitless, with all reasonable dispatch the pumps were ordered to be stopped. Can it be said, under the facts of this case, that the agents or servants of defendants were guilty of negligence because forsooth they did not first see and procure the stopping of the pumps? We think not. To have thus consumed the time required may have been to no purpose after all and also may have been at the expense of a possible chance to save the life of the deceased, and the law does not demand in such emergencies, mathematical accuracy or conduct of exact calculation so as to fasten liability on the actor should he miscalculate as to the proper things to do and the order in which they should be done."

The general rule, stated in 23 Cyc. 434, is that: "If an act has to be performed in a brief period with no time in which to determine the best course, negligence cannot be predicated of it." If this were not so the rule more strongly would require plaintiff to show that stopping of the pumps would have been a probably more efficient method to pursue than to seek what was sought. At all events, there was a case where reasonable judgment was to be relied on, had there been no necessity to come to an immediate conclusion.

APPEAL AND ERROR—REVERSAL AS TO ONE OF TWO CONSPIRATORS AND AFFIRMANCE AS TO OTHER.—In People v. La Bow, 118 N. E. 395, decided by Illinois Supreme Court, it was held in a conspiracy case against two defendants tried jointly, that reversal and remand by Illinois Appellate Court as to one, as to whom error was committed in ruling on evidence, necessitated reversal as to the other, dissent by the chief justice being announced.

There were questions considered as to co-defendant Shapiro, who was attempting to show he had no connection with any conspiracy to obtain money fraudulently. The connection claimed depended for its proof upon an alleged conversation between the two defendants and the obtaining of the money afterwards. No overt act by the co-defendant was shown. The Court of Appeals held there was error in excluding testimony by him as to contradictory statements by the witness regarding the actual conversation and its purport.

The reversal by the Court of Appeals being held to be final, it was said by Supreme Court: "From the evidence in this record it is apparent that the plaintiff in error was guilty of obtaining money unlawfully from these women. He was not charged in the indictment with that crime. He was charged with and convicted of the crime of conspiring with Shapiro to thus obtain money, and the transactions proven in which it was shown the money was obtained were admissible only as tending to prove the conspiracy and to characterize the crime with which defendants were charged. If Shapiro was not guilty of conspiracy or if there was a doubt as to his participation in a conspiracy with plaintiff in error, it must follow that plaintiff in error was not guilty, as that same error must be resolved in his favor. There is no evidence in the record of a conspiracy on the part of plaintiff in error with any one except Shapiro. In order to sustain a conviction for a conspiracy there must be more than one person shown to be guilty."

It is the law that conspiracy to commit a crime is different from the consummated crime which is its object. U. S. v. Robinovitch, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed., 1211; Com. v. Ward, 92 Ky., 158, 17 S. W. 283. And where, as for example, husband and wife cannot be convicted of conspiring to commit an offense, each may be tried for committing a consummated offense. State v. Mann, 39 Wash. 144, 81 Pac. 561. It seems, therefore, to have been altogether unnecessary for these two defendants to have been jointly indicted, and had they been there would have been full notice with opportunity for defense. Where the essence of the offense is in the conspiracy this would be different. In case the essence is in the consummated crime, evidence of conspiracy to commit would be perfectly competent, or to show identity of an accused or the intent with which it was committed. In such a case there is such a relation between conspiracy and consummation as ought to allow the two things to be charged in one indictment with different counts. It would not be a too liberal practice to allow a court to amend an indictment by adding a count for commission, where conspiracy is not the gist of the matter.

PRIVATE CONTRACTS AND STATE REQUISITIONS.

The recent judgment of the House of Lords in the case of Dick Kerr & Co., v. Metropolitan Water Board,[1] is a landmark in the development of the law as to when performance of a contract may be excused on the ground of impossibility of performance. The old rule of the common law that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, even though performance has become unexpectedly burdensome or even impossible held sway in our courts until Lord Blackburn's judgment in the case of Taylor v. Caldwell, 1863,[2] in which that eminent authority mitigated the rigor of the old rule by the following pronouncement regarding it: "This rule is only applicable when the contract is positive and absolute, and not subject to any condition, either expressed or implied, and there are authorities which establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the

(1) 114 L. T. J. 75.
(2) 3 B. & S. 826.

perishing of the thing without default of the contractor."

That principle has been gradually extended and particularly during the war, its latest application being in the case of Dick Kerr & Co., already referred to. The facts of that case were briefly as follows: Just before the war began the defendants contracted to make a reservoir which was to be completed within six years. The contract contained a stipulation that, if by reason of any impediment the defendants were delayed in the completion, the time might be extended by the plaintiff's engineer. The carrying on of the work was prevented by the Minister of Munitions, who, under his powers, caused the plant on the works to be removed. The Court of Appeal held that the interruption of the work thus caused was not such a temporary interruption as could be regarded as falling within the suspensory clause of the contract. The House of Lords has now upheld the Court of Appeal. Wherefore it would seem that these suspensory clauses in contracts entered into before the war, and no doubt in many contracts entered into since the war, have not the effect of keeping contracts on foot where the object of the contract is in substance frustrated by unforeseen circumstances making performance as contemplated by the parties impossible. "It is obvious," remarks one legal contemporary, "that cases of this kind all go to discredit the old dogmatic rule that an absolute contract must be performed, or damages paid for non-performance."

Notwithstanding this considerable modification of the common law the legislature recognized that in case of direct interference by the state with private contracts under the necessity of war requirements, the situation was not sufficiently met by the common law, and consequently there was enacted Section 1 (2) of the Defence of the Realm (No. 2) Act of 1915, which provides:

"Where the fulfillment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement * * * of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfillment of the contract so far as it is due to that interference."

That proviso has since been extended to requirements of any government department, or of a competent naval or military authority.[3]

Two decisions on these statutory enactments illustrate when they may be justifiably used and when not. The first we propose to refer to, Manuel Mas v. Brookless Bros.,[4] was an action of damages for breach of contract by a Madrid merchant against a firm of exporters in Aberdeen. In consequence of the war the export of goods from the United Kingdom to foreign countries was subject to very strict supervision by the British Government, and exporters were advised before doing business with European firms to refer to the Chairman of the War Trade Intelligence Department. The defendants did refer to the department for guidance, and its chairman wrote them in reply: "According to my information the firms of Manuel Mas, Madrid (and others named) are forwarding agents and it would not appear desirable to undertake to export to these firms unless you are informed of the actual buyers of the goods to be exported and their names appear on the documents." On receipt of this letter the defendants wrote to the plaintiff requesting him to give the names of his buyers; but this, the plaintiff explained, it was not possible for him to do. After some further correspondence the exporters cancelled the contract, and the court held that by virtue of the statu-

(3) The Courts Emergency Powers, Act of 1917.

(4) 1917, 2 B. L. T. 139.

tory provisions above mentioned the defendants were not liable in damages and dismissed the action against them.

The effect of the decision in the other case which we propose to comment on,[5] will be to check any tendency on the part of manufacturers to rely too readily on the statutory protection or even to attempt to utilize it for their own private benefit. The defendants had entered into a contract to supply a large quantity of boots to the plaintiffs which were intended for use in the Army, and for the purposes of carrying out their contract they had entered into a subcontract with a firm of boot manufacturers named Mumfords, whose factory was afterwards requisitioned by the War Office while the order was in process of execution. Instead of attempting to get the order carried out by some other manufacturer or applying the goods already manufactured (which were in fact released by the representative of the War Office as soon as he became aware of the circumstances) to the part fulfillment of the contract, the defendants contented themselves with a repudiation of the whole contract, relying on the protection of the enactment referred to. The statutory exemptions, however, are limited in each case to contracts the fulfilment of which is prevented by the "necessity" of complying with some Government requisition, and the burden is cast on the defaulting contractor to prove that such a necessity was the real cause of non-fulfilment. In result the defendants failed to satisfy the court that the requisition of their sub-contractor's works was the real cause of the failure to supply the goods.

In the course of argument in the case it was contended that the judgment of the House of Lords in the case of Dick Kerr & Co., was applicable to the effect that as soon as the Government requisition was made on Mumfords, the whole contract was at an end. But, however, that might be as to the sub-contract, it did not apply to the main contract between the parties in this action, which still remained capable of performance.

(5) Lothburg Supply Association v. Flatau & Co., Law Journal, 1917, p. 436.

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LIMITATIONS OF THE TREATY-MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES WITH THE CONCURRENCE POWER OF THE SENATE—PART I — NATURE AND EXTENT OF SUCH POWER.*

The purpose of this paper is to show: That the Constitution of the United States does not vest any authority in the President with the advice and consent of the Senate to enact a treaty between the United States government and any foreign country, which in any way, remotely or otherwise, restricts the sole and absolute right of the states of the United States to regulate and control the vesting of the title and leases of the uses of real estate situated within their boundaries, the title of which is owned by citizens thereof or by the states.

Nature and Extent of the Treaty-making Power of the Government of the United States.—The Constitution says that the President "shall have power by and with the advice of the Senate to make treaties, provided two-thirds of the senators present concur."[1]

The President may, before negotiating a treaty, ask the Senate for advice, and his right to do so has never been disputed.[2]

*Part II of this article will appear in next week's issue and will discuss the application of these principles to the controversy with Japan and the California land laws.

(1) Art. II, Sec. 2, 2.

(2) Washington did so repeatedly, and Polk did it in 1846 in case of the treaty with England relative to Oregon. Von Holst's Constitutional Law of U. S. (1887), p. 201.

(3) See Gadsden Treaty of December 30, 1853. Von Holst's Constitutional History, Vol. V, pp. 6-9.

The Senate may amend a treaty laid before it without rendering it unconstitutional.[3] But the President would not be bound to obey the request. The expression of such a wish is without doubt also within the power of the House of Representatives.[4]

"The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society, while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seems to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the execution of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. The power in question seems, therefore, to form a distinct department, and to belong, properly, neither to the legislative nor to the executive."[5]

Hence the sole authority of the government of the United States to enter into the contractual relation (to enact a treaty) with a foreign country is vested by the Constitution in the President. The President may be defeated in consummating such a contract if two-thirds of the senators present disapprove the treaty, but the said two-thirds of the senators cannot consummate a valid treaty without the President's signature to the same.

It is trite to say that the Constitution consists solely of enumerated powers. But the subject-matter of any treaty entered into by the President on behalf of the United States with foreign nations, must come within the enumerated powers vested in the President and Congress as expressed by the Constitution. Hence, any treaty stipulation which is inconsistent with the provisions of the Constitution is inadmissible and, according to constitutional law, *ipso facto*, null and void.

"Simple and self-evident as this principle is in theory, yet it may be very difficult under certain circumstances to decide whether or not it has been transgressed in fact. Indeed, the chief difficulty arises from the question of the relation the treaty-making power of the President with the concurrence power of the Senate bears to the legislative power of Congress. This question is answered by saying that these powers must be co-ordinate, for treaties, like laws, are 'sovereign acts,' which differ from laws only in form and in the organs by which the sovereign will expresses itself."[6]

It follows from this principle that a law can be repealed by a treaty,[7] as well as a treaty by a law.[8] If a law and a treaty are in conflict, their respective dates must decide whether the one or the other is to be held as repealed.[9]

"The courts of the United States cannot hold a law unconstitutional upon the ground that it violates treaty obligations. Such a question is an international one, to be settled by the foreign nations interested therein and the political department of the government."[10]

The rule for determining the extent of the treaty-making power of the United States is therefore proven to be this:

That the treaty-making power of the President of the United States with the concurrence power of the Senate and the legislative power of Congress are co-ordinate powers, both being "sovereign acts"—and differ from laws only in form and in the organs by which the sovereign will expresses itself.

The rule laid down in the case of Foster v. Neilson has been constantly affirmed in

(4) Von Holst's Const. Law of U. S. (1187), pp. 201-202.

(5) Hamilton in The Federalist, No. LXXV.

(6) Von Holst's Const. Law of U. S., p. 202; Callaghan & Co., 1887.

(7) Foster v. Neilson, Peters II, 253 (U. S. 27), Jan. Term, 1829.

(8) The Cherokee Tobacco, Wallace XI, 616 (U. S., 78), 1871.

(9) Foster v. Neilson, Peters II, 253, 314 (U. S. 57); Doe, et al. v. Braden Howard XVI, 635, December Term, 1853.

(10) Gray v. Clinton Bridge, 7 American Law Register (N. S.) 151; Hammond I, 22 Sec. 54.

a long line of cases;[11] also the rule established in the Cherokee Tobacco cases, just stated, has been approved by an unbroken chain of decisions. [12]

Cases Which Illustrate the Limitation of the Extent of the Treaty-making Power and the Principles Underlying the Same.—A treaty is primarily in its nature a contract between nations, and not a legislative act. A treaty with the United States is, however, more than a contract between nations,[13] being, as declared by the Constitution of the United States (Art. 6), the supreme law of the land and binding upon all courts, both state and federal.

The treaty-making power of the United States is as expressed in the Constitution, unlimited,[14] and subject only to those restraints which are found in that instrument against the action of the government or its departments and those arising from the nature of the government itself and of that of the states.[14] To what extent it is thus limited has been considerably discussed without being definitely defined,[15] no treaty having ever been declared by the courts to be void.[16] It would seem clear, however, that the treaty-making power does not extend so far as to authorize what the Constitution forbids,[17] or a change in the character of the government, or in that of the states,[18] and it has also been stated that it would not authorize a cession of any portion of the territory of a state without the consent of that state.[19]

An Act of Congress cannot be declared unconstitutional or void because it is in conflict with the provisions of a prior treaty. A statute is a law equal with a treaty and, if subsequent and conflicting with the treaty, supersedes the latter.[20] This is the holding of the court in Horner v. U. S., where it was contended that 3894 U. S. R. Statute was unconstitutional and void because it was a violation of a treaty between the United States and Austria.

"So far as a treaty, made by the United States with any foreign nation, can be made the subject of judicial cognizance, in the courts of the country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal."[21]

There is no Federal Probate Law.—The Supreme Court of the United States, in construing the provisions of the Italian treaty of May 8, 1878, and the Argentine treaty of July 27, 1853, respecting the appointment of administrators of estates of deceased aliens, says:

"The most-favored-nation clause in the Italian treaty of May 8, 1878 (20 Stat. at L. 732), does not given an Italian Consul General the right to administer the estate of an Italian citizen dying intestate in one of the States of the United States, to the exclusion of the one authorized by the local law to administer the estate, because of the privileges conferred by the Argentine treaty of July 27, 1853 (10 Stat. at L. 1009), art. 9, upon the consular officers of the respective countries as to citizens dying intestate, 'to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs,' since this provision, if applicable, cannot be construed as intended to supersede the local law as to the administration of such estates."[22]

In the second paragraph of the syllabus of the Rocca case just cited, the court says: "'There is no federal probate law, but the right to administer the property left by a foreigner within the jurisdiction of a state is primarily committed to state law."

(11) Supra; Edye v. Robertson, 112 U. S. 580.
(12) 2 Peters (U. S.) 253.
(13) U. S. v. Rauscher, 119 U. S. 407 (1886); 2 Peters U. S. 253; Minnesota Canal, etc., Co. v. Pratt, 101 Minn. 197.
(14) DeGeofroy v. Riggs, 133 U. S. 258 (1889).
(15) 133 U. S. 258 (1889).
(16) Ware v. Hylton, 3 Doll. (U. S.) 199 (1796).
(17) 133 U. S. 258.
(18) 133 U. S. 258.
(19) 133 U. S. 258.
(20) Horner v. U. S., 143 U. S. 570 (Feb. 29, 1892).
(21) 31:386, Whitney v. Robertson, 124 U. S. 190 (Jan. 29, 1888); 28:798, Head Money Cases, 112 U. S. 580 (1884); 32:1088, Chinese Exclusion Case, Ping v. U. S., 130 U. 581 (May 19, 1889).
(22) Rocca v. Thompson, 223 U. S. Ct. Rep. (Feb. 19, 1912).

This is the law in the United States, from which there is no appeal. There is nowhere in the Constitution or its amendments any authority vested in Congress to enact a law assuming charge of the administration of estates under the jurisdiction of the states, nor authorizing the President to make a treaty containing provisions vesting anyone with authority to administer estates of deceased aliens to the exclusion of those specified by the state law, notwithstanding the "Quaere" raised by the court in the Rocca case, *viz.*, "Whether it is within the treaty-making power of the national government to provide by treaty with foreign nations for administration of property of foreigners dying within a state and to commit such administration to consuls of the nation to which deceased owed allegiance."

Thus we have established a second proposition:

That neither the treaty-making power nor the Congress of the United States have assumed (nor attempted to assume) jurisdiction over those property rights which are incident to the administration of estates of deceased aliens, by vesting foreign consuls with rights prior to and exclusive of the rights of those persons named in the state statutes, and over which the state legislatures have always exercised jurisdiction through the administration of their laws of probate—a sovereign right of the states, and relate solely to matters of local interest.

The Act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the Act of 1882 as amended by the Act of 1884, granting them permission to return, is valid.[23]

Although the Act of 1888 is in contravention of express stipulations of the Treaty of 1868 and of the Supplemental Treaty of 1880, it is not on that account invalid or to be restricted in its enforcement.

(23) Ping v. U. S., 130 U. S. Ct. Rep. 581 (May 13, 1889).

Treaties are of no greater legal obligation than an Act of Congress, and are subject to such acts as Congress may pass for their enforcement or repeal.

The government of the United States, through the action of the legislative department, can exclude aliens from its territory, although no actual hostilities exist with the nation of which the aliens are subjects.

The power of exclusion of foreigners is an incident of sovereignty and the right of its exercise cannot be granted away or restrained on behalf of anyone.

In the case of Ping v. United States, the court lays down the rule, in its own language, which determines the extent of the treaty-making power of the President with the concurrence power of the Senate and the co-ordinate power of Congress in its relation thereto, in the following language:

Rule I.—"The treaties were of no greater legal obligation than the Act of Congress. By the Constitution, laws made in pursuance thereof, and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed, in that particular only, the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control."

In the same case the court defines the distinction between the governmental control of local matters, which are left to local authorities, and of national matters which are entrusted to the national government, as follows:

Rule II.—"The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institution existing over a widely extended country, having different climates and varied in-

terests, has been happily solved. For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

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SALES—RESCISSION.

KENNEDY v. HASSELSTROM.

Supreme Court of South Dakota. Feb. 5, 1918.

166 N. W. 231.

Where the purchaser of goods offered to rescind, but the seller refused to accept a return of the property, there was no accomplished rescission of the purchase.

WHITING, P. J. By plaintiff's original complaint, she sought to recover the price she had paid for certain personal property purchased of defendant, basing such claimed right of recovery on an alleged rescission of the purchase. Her amended complaint, while containing an allegation of an offer to rescind and a refusal of defendant to accept a return of the property purchased, contained all the essential allegations of an action for damages caused by fraud and deceit. Such alleged fraud and deceit consisted in false representations that defendant was the owner of the property. The trial court found all of the allegations of the amended complaint to be true; and also that:

"Since the commencement of this action the defendant having refused to agree to a rescission of the said sale and having declined to return to the plaintiff the said $440 or any part thereof, and the said personal property being then in substantially the same condition and of the same value as at the time of the pretended sale thereof by the defendant to plaintiff in February, 1914, plaintiff abandoned and surrendered the possession thereof, and has at no time since then asserted any possession or control of the same."

The trial court concluded that plaintiff was entitled to recover the full purchase money, "for and as money procured by fraud and false and fraudulent pretenses"; and rendered judgment therefore, which judgment recited that such money "was procured by the defendant from the plaintiff by fraud and by means of false and fraudulent pretenses." From such judgment and an order denying a new trial this appeal was taken.

It is clear that, when this action was brought there had been no accomplished rescission of the purchase. The judgment herein cannot therefore be sustained upon the ground that, having rescinded, plaintiff was entitled to recover the purchase money. Neither can the judgment be sustained as a judgment based upon the implied warranty of title because plaintiff had never been deprived of the possession of the property. Section 2304, C. C. But plaintiff was entitled to recover damages for the false representations as to title, and his right of recovery was in no respect dependent upon any recovery of possession from her by the true owner. Hull v. Caldwell, 3 S. D. 451, 54 N. W. 100. It follows, therefore, that the findings support the judgment.

We find no reversible error in the rulings upon the admission of evidence, nor any questions raised upon such rulings as meriting discussion.

The only further question for consideration arises upon the assignment that the evidence does not support the finding that defendant was not the owner of any of the property. It is clear that plaintiff's recovery for damages caused by the false representations as to title must be limited by the amount of property to which defendant did not have title—plaintiff cannot recover the value of any property the title to which did pass to her from defendant when there had been no rescission. Of course, if there had been a rescission prior to suit brought, the situation would be different. In that case the consideration being, as in this case, indivisible, there could have been a complete rescission and then a recovery of the whole purchase price. The same would have been true if rescission had been asked for and decreed; with such decree there could have been joined a judgment for recovery of purchase price. But where the only recovery is one for damages based on false representations as to title of property purchased, and the representations were true as to some property, then there having been no rescission or there being no rescission prayed for or granted, there must be credited against the total purchase price the value of that property title to which did pass to the purchaser. Among the property included in the transaction between these parties was certain wire fencing, a part of which was on government land that had been rented by defendant. Title and possession of

such wire passed to plaintiff. The above-quoted finding is not supported by the evidence, there being no evidence that, even after suit brought, defendant ever surrendered possession of this wire. The value thereof should have been found by the trial court and deducted from the amount of the judgment rendered. There is no evidence from which we can determine the value of this wire, thus permitting a modification of the judgment by this court.

The judgment and order are reversed without costs to either party; and the cause is remanded to the trial court for further proceedings in harmony with this opinion.

SMITH, J. (dissenting). I cannot concur in the view of my Associates in this case. The complaint contains every allegation essential to a recovery of the purchase price of property in assumpsit, upon a rescission of a contract for fraud, and the trial court found every fact which in law is essential to such a recovery. The majority opinion holds, in effect, that where the plaintiff has offered to return everything received under a fraudulent contract—in short, to do every act necessary to complete a rescission—there has been "no accomplished rescission of the purchase." If this means anything it means that the refusal of a dishonest defendant to accept a return of the property "defeats the accomplishment of a rescission." A conclusion founded upon such a misconception of the law cannot be correct. The majority opinion, however, reaches the right result, because of the fact shown by the record, that plaintiff, after offering to return it, continued to use the property and to exercise acts of ownership over it, which acts constituted a waiver of the rescission. Mizell v. Watson, 57 Fla. 111, 49 South, 149.

My majority Associates I think are wrong in assuming, in the face of the pleadings and findings of the trial court, that the action was, or could be transformed into, an action for damages for deceit, and then holding the evidence insufficient to sustain a recovery. The complaint alleges the making of the contract; that plaintiff was induced to enter into it by false representations stated, and "that promptly upon the discovery of the falsity of such representations, this plaintiff offered to rescind the said purchase and tender back to the defendant all of the said personal property, and demanded of him that he should repay to this plaintiff the said sum of four hundred forty (440) dollars, but the defendant wrongfully, wilfully, and fraudulently refused, and still refuses, to receive back the said personal property, or to repay the said money to this plaintiff," and alleges as her damages the amount paid as the purchase price of the property.

The answer denies the fraud and the offer to rescind. The trial court found that the representations alleged were falsely and fraudulently made by defendant, and that plaintiff was induced thereby to enter into the contract, and "that promptly upon the discovery of the falsity of such representations with reference to the said personal property and the fertile agricultural lands above mentioned plaintiff offered to rescind the said purchase, and tendered back to the defendant all of the said personal property, and demanded of him that he should repay to the plaintiff the said sum of $440, but the defendant wrongfully, fraudulently, and unlawfully refused, and still refuses, to receive back the said personal property, or to repay the said money to the plaintiff," and that plaintiff was entitled to recover $440, the purchase price, with interest at 7 per cent. from the date it was paid to defendant. If this is not an action, as in assumpsit founded upon a recission of a fraudulent contract, for recovery of the purchase price, as disclosed both by the pleadings and the findings of the trial court, I must confess dense ignorance as to what such an action is. Nor do I see any necessity whatever for deciding a case upon, and adopting in this court, a theory which plainly was not in the pleadings of the parties, nor in the mind of the trial court.

NOTE.—*Use of Property After Tender as Waiver of Rescission.*—We think it cannot be rightly held, as the majority opinion says, that tender of property and refusal to accept prevents, in a case where there is right to rescind, a rescission from becoming an accomplished fact. The comment of the dissenting judge in this case seems entirely proper, but as he also says use of the property afterwards may have constituted waiver. The facts in each case determine the result.

In Noble v. Olympia Brewing Co., 64 Wash., 461, 117 Pac. 241, 36 L. R. A. (N. S.) 467, there was a majority opinion of four to three in which it was held that where a purchaser after notifying seller of refusal to accept goods which were discovered to be inferior in quality, used them in his business, he waives right of rescission, but not claim of right of recoupment. What the purchaser was really contending for in this case was a discount in the selling price and without obtaining seller's consent therefor, he continued to use the goods.

Where goods are sold with privilege of test, it is said that no waiver results from testing what is only necessary to determine quality. If more is used, this constitutes waiver. Fox v. Williamson, 133 Wis. 337, 113 N. W. 669; 14 L. R. A. (N. S.) 1107; or if use is made after expiration of testing period, Springfield Engine

Stop Co. v. Sharp, 184 Mass., 266, 68 N. E. 224; Dawes v. Peebles' Sons, 6 Fed. 856. Any use after discovery of defect constitutes waiver. Comer v. Franklin, 169 Ala. 573, 53 So. 797; Sturgis v. Whisler, 145 Mo. App. 148, 130 S. W. 111; Van Dohren v. John Deere Plow Co., 71 Neb. 276, 98 N. W. 830; Cookingham v. Dusa, 41 Kan. 229, 21 Pac. 95; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608.

But the nature of the use and its time are features to be taken into consideration. Thus a temporary use neither affecting the value of or injuring an article is not as matter of law a waiver of the right to rescind, Schwartz v. Church of the Holy Cross, 60 Minn. 183, 62 N. W. 266. Nor use continued at request of seller. Crabtree v. Potts, 108 Ill. App. 627. Nor, to make a thoroughly conclusive test, McCormick Harv. & M. Co. v. Dodkins, 24 Ky. L. Rep. 2306, 73 S. W. 1129. Repeated use for testing may cover a considerable period of time, where at request of seller. Sandwich May Co. v. Kelly, 26 Ill App. 394. But test being finished, insistence on rescision must be promptly urged. Cookingham v. Dusa, *supra*.

Presumption of waiver of right of rescission may be rebutted by buyer showing that the property has been held subject to order of seller. Comer v. Franklin, *supra;* Inman Mfg. Co. v. Am. Cereal Co. 124 Iowa, 737, 100 N. W. 860. The property, however, must be kept as a whole and not some of it sold to others. J. L. Owens Co. v. Doughty, 16 N. D. 110, 110 N. W. 78. Nor can a part be used on the theory of lessening the damages, where use is for buyer's benefit. Sturgis v. Whisler, *supra*.

However all questions of reasonableness are for the jury, generally speaking. Mizell v. Watson, 57 Fla. 111, 49 So. 149. If the facts are few and the evidence undisputed, this may be a question for the court. Gammon v. Abrams, 53 Wis. 323, 10 N. W. 479, Libby v. Haley, 91 Me. 331, 39 Atl. 1004.

Notice to rescind is not the equivalent of rescission unless there is tender of the property. It may be only an expression of willingness to return the property. Thus where buyer wrote saying where the property could be gotten, buyer being unwilling to take it at any price, this is not an accomplished rescission. Skillings v. Collins, 224 Mass. 276, 112 N. E. 938.

If goods are shipped subject to inspection, they must be seasonably inspected, and if rejected, there must be return or offer thereto in a reasonable time. Allaire Woodward & Co. v. Cole, Mo. App. 187 S. W. 816. This does not, however, preclude buyer from showing that goods are wholly worthless, *ibid.*

As to what should be done in case of rejection of an article by the buyer, that is to say whether seller should regain possession or the buyer offer to put him in possession, this depends upon the circumstances of the sale. If an article of a wholly different kind is sent, the buyer is not required to return it. Gibson v. Vail, 53 Vt. 476; Unadilla Silo Co. v. M. A. Hull & Son, Vt. 96 Atl. 535; Spaulding v. Housecom, 67 N. H. 401, 32 Atl. 154; Rheinstrom v. Steiner, 69 Ohio St. 452, 69 N. E. 749, 100 Am. St. Rep. 699.

Generally then it may be said, that it is rather a question of mixed law and fact when a right of rescission is lawfully preserved and when it is waived, as also what duty devolves on the seller and what on the buyer as to retaking possession or of tender of property by the buyer.

C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 145.

Public Prosecutor; Relation to Court; Relation to other attorneys—Permitting veniremen to be selected as a trial-juror, when prosecutor is informed that former has expressed opinion that defendant should be convicted. Withholding such information from Court and adverse counsel.; Disapproved.—Our statute provides that upon entering upon the trial of a cause in the Circuit Court, each party is furnished with a written list of the venire from which the trial-jury is to be selected. The parties alternately strike venire-men from the list until but twelve men are left, and they compose the trial-jury. In a criminal case, the prosecuting attorney has been informed that a certain individual on the venire has announced that in his opinion the defendant should be convicted. Is it proper for the prosecuting attorney to refrain from striking that individual from the list, and to refrain from informing defendant's attorney or the Court that said individual has expressed an opinion adverse to defendant?

ANSWER No. 145.

In the opinion of the Committee, the defendant is entitled to a trial by an unbiased jury. Good faith and fair dealing on the part of the prosecuting attorney require either that he should seasonably inform the judge presiding and the attorney for the defendant of the alleged expression of opinion by the venire-man, or should of his own accord strike the venire-man from the list. (See Canon 5, American Bar Association.)

QUESTION No. 146.

Relation to Court; Relation to Client—Lawyer who becomes convinced by the direct testimony of an adverse expert witness, not cross-examined, that client's cause is unfounded,

causes a judgment to be entered dismissing his client's action; Disapproved.—A woman brings an action against a decedent's estate on an alleged contract between her father and decedent for her adoption, whereunder she was to receive one-third of decedent's estate. The vice-president of the bank, of which decedent was president, testified that in his opinion the contract was actually signed by decedent. After the trial had lasted several days, a handwriting expert of repute testified for the defense. The next morning, plaintiff's counsel, without cross-examining the defendant's expert, said to the court in substance that up to the time of said expert's testimony he had been convinced of the justice of the cause, but thereafter felt serious doubt as to the genuineness of the contract, and said, "I felt then that possibly an imposition had been practiced upon me. I don't propose to practice an imposition upon this court or upon any other person. I therefore ask at this time for a dismissal of the case, or for a judgment that will end the case." Judgment was entered accordingly. Subsequently the plaintiff was tried and acquitted under an indictment for forgery of said contract, but the court on the civil side refused to reopen the case.

Even if the plaintiff's counsel was convinced in his own mind that there was forgery, was not his duty limited to a withdrawal from the case? Was it not his duty in any event to cross-examine the expert before asking a judgment against his client?

ANSWER No. 146.

A lawyer should not seek to secure for his client relief predicated upon testimony known to him to be false. The question, however, does not suggest such *knowledge*, but merely the attorney's individual conclusion. While the question implies that this conclusion was reached upon insufficient investigation, and that he acted imprudently, nevertheless if he reached the conscientious conclusion that further prosecution of the action would be an imposition upon the Court, the impropriety of his continuance in the cause is apparent. In the opinion of the Committee, unless the client consented to the retirement of the attorney, or to the dismissal or discontinuance of the cause, he should privately have stated to the Court his application for leave to withdraw, and the reasons therefore, and should have asked that the cause be continued to enable the client to procure other counsel.

In the opinion of the Committee, no general rule can be laid down respecting the duty of cross-examination.

HUMOR OF THE LAW.

There had been an accident. The motor car had run over a man's toes and now the injured party was claiming damages.

"What! You want $100 for a crushed foot?" cried the motorist. "Look here, I'm not a millionaire!"

"Perhaps you ain't," replied the victim firmly, "and I ain't no centipede."—Southern Ruralist.

In a suit against a St. Louis corporation, brought by a passenger for invisible injuries to her back, the plaintiff had been required to repeat her story several times.

Learned counsel for the defendant, in his address to the jury, commented eloquently upon the plaintiff's self-contradiction, and at the climax of his denunciation shouted:

"And not once, gentlemen, did she tell the same story twice!"

Well, how would you say it?

"Ambassador Gerard," said a New York broker, "had a happy way in Berlin of chaffing the great war lords and dictators.

"A grand duke said to the ambassador at a reception:

" 'Germany will win this war. Then let America look out.'

" 'How will Germany win?' said Mr. Gerard, calmly.

" 'With her submarines, with her gases, and, above all,' said the grand duke, 'with perseverance. Perseverance, Mr. Ambassador, always conquers.'

" 'Always?' said Mr. Gerard, winking at his second secretary. 'How about the hen on the china egg.' "—Washington Star.

One of Washington's citizens recently saw Admiral Gleaves, the man who drove the submarines away from the Pershing flotilla, walking in civilian clothes. There is an order requiring officers to wear uniform at all times. The citizen went to Secretary Daniels.

"Mr. Secretary," he whispered breathlessly, "I just saw Admiral Gleaves in citizen's clothes. Why is he in disguise?"

"Sh! said the Secretary. "It's the Chinese situation."

"Chinese situation?"

"Yes," replied the Secretary, in all seriousness. "Admiral Gleaves' last clean uniform did not come back from the laundry."—New York Evening Journal.

WEEKLY DIGEST

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1. **Appeal and Error**—Appearance.—A request by attorneys, in an action to annul a marriage, to allow defendant an extension of time in which to plead, which for all that appears was not authorized, was not equivalent to an appearance within Code Civ. Proc. § 1014.—Benson v. Benson, Cal., 169 Pac. 369.

2. **Assignments**—Premium Coupons.—Premium coupons, issued by soap company with soap sold, containing unrestricted promise of redemption, are good in hands of bona fide transferee for value, notwithstanding restriction against transfer.—Payne v. Lautz Bros. & Co., N. Y., 168 N. Y. S. 369.

3. **Attorney and Client**—Disbarment.—Disbarred attorney could not maintain mandamus commanding justice of superior court to allow him to act as counsel in suit in equity, under Rev. Laws, c. 165, § 45, as amended by St. 1914, c. 432.—Casey v. Wait, Mass., 118 N. E. 297.

4.——Evidence.—That defendant, sued for money collected on judgment obtained by plaintiff, signed the satisfaction of judgment as his attorney, is some evidence of his employment as such L. O. L. §§ 1074, 1083.—Caples v. Ditchburn, Ore., 169 Pac. 510.

5.——Modification of Decree.—On attorney's application to modify original decree of disbarment, held, that judges of district court acted beyond their authority, and illegally, in canceling second decree, which, in effect, canceled disbarment, except in so far as it affected practice within state.—Maxey v. Polk County District Court, Iowa, 165 N. W. 1005.

6.——Promoters.—Money intrusted to an attorney and member of committee of promoters by the committee, held properly treated as the money of the committee, which the attorney was not required to pay over while his services and expenses remained unpaid.—In re Marvin, N. Y., 168 N. Y. S. 555.

7.——Services Rendered.—Attorney, suing his client, may have and state cause of action for money judgment on account of services rendered and money advanced, though purpose is to foreclose attorney's lien, existence of which is open to denial.—English v. Jenks, Mont., 169 Pac. 727.

8. **Bailment**—Gratuitous Bailee.—Failure of gratuitous bailee of diamond earrings to return one which he had lost was not a conversion; trover not being maintainable on proof of negligence, but only of misfeasance amounting to conversion.—Rubin v. Huhn, Mass., 118 N. E. 290.

9. **Bankruptcy**—Burden of Proof.—On a petition by a trustee to require a bankrupt to turn over money or property, the trustee is not required to prove fraud in the contracting of the debts, even though alleged.—Henkin v. Fousek, U. S. C. C. A., 246 Fed. 285.

10.——Fraud.—Where an insolvent advertiser, in order to get his printing done, agreed to turn over accounts accruing each month sufficient to pay for the printing for such month, and the accounts are turned over and collected, there was no fraud on creditors for such accounts assigned over within four months of filing a petition in bankruptcy.—Fotter v. American Printing & Lithographing Co., Iowa, 165 N. W. 1044.

11.——Lien.—Judgment of Colorado state court in favor of vendor and against bankrupt ordering foreclosure of vendor's lien did not establish lien, and though rendered within four months of filing of petition in bankruptcy, such lien is valid despite Bankr. Act July 1, 1898, § 67f.—Farrell v. Wysong, U. S. C. C. A., 246 Fed. 281.

12.——Mortgage.—Under Bankr. Act, § 60, subd. "b," as amended by Act June 25, 1910, c. 412, § 47, subd. "a," and Civ. Code Ga. 1910, § 3260, mortgage recorded within four months before bankruptcy and before any creditor had acquired superior rights, held valid as against trustee.—Martin v. Commercial Nat. Bank of Macon, Ga., U. S. S. C., 38 S. Ct. 176.

13.——Review of Orders.—An order requiring a bankrupt to turn over money to his trustee cannot be reviewed on a petition to revise, where the only question raised is the sufficiency of the evidence and there is evidence to support the order.—Henkin v. Fousek, U. S. C. C. A., 246 Fed. 285.

14. **Banks and Banking**—Unlawful Loan.—A loan made by a bank to its officers in violation of Rev. Laws 1910, § 270, was not void as between the bank and the debtor, who cannot

defeat a recovery on that ground.—Schuber v. McDuffee, Okla., 169 Pac. 642.

15. **Bills and Notes**—Cancellation.—If payee of note released maker in consideration of deed to payee's wife, and such fact was known to the assignee, who was a mere volunteer, the maker was entitled to cancellation.—Bass v. Borries, Miss., 77 So. 189.

16.——Equity.—Where all the makers of a note executed it as principals, that one of them gave his note to the holder of the first note, long after the first note had matured, as collateral security for its payment, created no equity in the other makers of the first note, entitling them to object to the return of the collateral note.—Levey v. Henderson, Cal., 169 Pac. 673.

17.——Evidence.—In action on note wherein defendants set up fraud in that plaintiffs, on exchange of land, agreed to take one-half of commission from each party, and accepted $1,000 from the others, but represented that such others paid $2,500 and so secured the note in suit, it was error to exclude the agreement by which plaintiffs accepted $1,000 from one side.—Zirbes v. Mousney, Cal., 169 Pac. 368.

18. **Brokers**—Accounting.—Plaintiff who was to have share of profits from theater for procuring owner of lots to build theater and lease it to defendants, held entitled to sue at law, and not limited to a suit for an accounting.—Griffiths v. Von Herberg, Wash., 169 Pac. 587.

19.——Finding Purchaser.—Where a real estate broker introduces the purchaser to the owner, he has done all that the law requires of him to entitle him to his commission, though the owner subsequently sells the property, or a part thereof, at a reduced price.—Ryan v. Walker, Cal., 169 Pac. 417.

20.——Middleman.—One employed merely to bring together persons desirous to exchange property, or to sell and buy, is a "middleman," agent for neither, and entitled to receive commission from both.—Tracey v. Blake, Mass., 118 N. E. 271.

21. **Carriers of Goods**—Limitation of Recovery.—Where shipper of dog by express contract limited recovery to carrier's negligence and agreed to assume the burden of proof, and carrier departed from agreed route, it had the burden of showing that death was not due to such departure or such negligence, notwithstanding Interstate Commerce Act and Hepburn and Carmack Amendments.—Ely v. Barrett, N. Y., 168 N. Y. S. 419.

22. **Carriers of Livestock**—Claim for Damages.—Stipulation of contract for intrastate shipment of horses requiring claim for damages to be in writing, verified by shipper, and delivered to carrier's agent within five days of removal of injured horse from car, was reasonable and valid.—Fletcher v. New York Cent. & H. R. R. Co., Mass., 118 N. E. 294.

23.——Notice.—Provision in contract for interstate shipment of live stock that as condition precedent to suit for damages shipper shall give written notice of claim to carrier's agent within 90 days after injury, and that failure to comply therewith shall bar recovery, is valid.—Chicago, R. I. & P. Ry. Co. v. McElreath, Okla., 169 Pac. 628.

24. **Carriers of Passengers**—Alighting from Car.—Railroad's grade of 2½ to 3 per cent. does not show negligence of railroad in relation to injury to passenger when car door closed on her hand, nor require presence of brakeman at door of each car where passengers are alighting.—MacGill-Allen v. New York, N. H. & H. R. Co., Mass., 118 N. E. 248.

25.——Common Knowledge.—It is common knowledge that competent motormen are negligent at times, and, fact that motorman was going at full headway does not show there could not have been sudden overfeeding of controlled by him.—Colorado Springs & Interurban Ry. Co. v. Reese, Colo., 169 Pac. 572.

26.——Incompetent Employe.—A railroad company whose physicians treated an injured passenger was not liable for their negligence or incompetence, unless it knew of their unfitness.—Denver & R. G. R. Co. v. Ptolemy, Colo., 169 Pac. 541.

27. **Commerce**—Newspaper Publication.—As interstate commerce is not only traffic, but is intercourse, the publication of a newspaper and its distribution from one state to another is interstate commerce.—Post Printing & Publishing Co. v. Brewster, U. S. D. C., 246 Fed. 321.

28. **Corporations**—Promoters.—Unless the charter or statute law otherwise provides, and the corporation does not, subsequent to the incorporation, obligate itself to pay, it need not pay for the services or expenses incurred in promoting its incorporation.—United German Silver Co. v. Bronson, Conn., 102 Atl. 647.

29.——Trustee ex Maleficio.—On an accounting to a corporation in a stockholder's suit for stock and dividends thereon held by defendants as trustees ex maleficio, dividends paid in stock or bonds and still held by defendants unconverted cannot be regarded as cash dividends.—Du Pont v. Du Pont, U. S. D. C., 246 Fed. 332.

30. **Conspiracy**—Tort.—Persons having similar individual contracts with third person, who conspire together to breach them and do breach them, whether for personal gain or sinister motives, are liable therefore in action for tort in the nature of a conspiracy.—Hendricks v. Forshey, W. Va., 94 S. E. 747.

31. **Contitutional Law**—Due Process of Law.—Contentions that order denying railroad company authority to continue lower rates than those charged to intermediate point, took property without due process of law because broader than the hearing, held unsound.—Louisville & N. R. Co. v. United States, U. S. S. C., 38 S. Ct. 141.

32.——Selective Draft.—Act May 18, 1917, c. 15, providing for raising an army by means of a selective draft does not impose involuntary servitude, in violation of Const. Amend. 13.—Arver v. United States, U. S. S. C., 38 S. Ct. 159.

33. **Contracts**—Exclusive Rights.—Where the plaintiff, who possessed a business organization adapted to the placing of such designs and indorsements as plaintiff might make or approve, entered into agreement for exclusive right to handle and sell all such or license others to market them, and take out copyrights, and in return defendant was to have one-half of "all profits and revenues" to be accounted

for monthly, an agreement that plaintiff would use all reasonable efforts to market such indorsements and designs was implied, and the contract is not void for want of mutuality and consideration.—Wood v. Lucy, Lady Duff-Gordon, N. Y., 118 N. E. 214.

34.——Rescission.—Where plaintiff was induced to pay defendant's agent on latter's false representations that voting contest conducted by defendant was going to be failure, and that if plaintiff would pay certain amount he would win automobile, etc., misrepresentations were not of a character to entitle plaintiff to rescind. —Brown v. C. A. Pierce & Co., Mass., 118 N. E. 266.

35. **Covenants**—Building Restriction.—A restriction in a deed against erection of any "building offensive to good neighborhood" does not apply to a garage for storage of 29 cars, where an owner may store the car which he drives.—Hammond v. Constant, N. Y., 168 N. Y. S. 394.

36. **Creditor's Suit** — Attachment. — Defendant's right to recover damages against trust company for breach of agreement to lend money is a "right which cannot be reached to be attached or taken in execution in an action at law," within Rev. Laws, c. 159, § 3, cl. 7.—Digney v. Blanchard, Mass., 118 N. E. 250.

37. **Damages** — Interference with Work. — Where defendant, owner of theater, who had contracted with plaintiff for installation of metal work, wrongfully prevented plaintiff from completing work, verdict for plaintiff for contract price, less cost of completing work by defendant, was justified, if nothing further appeared.—Millen v. Gulesian, Mass., 118 N. E. 267.

38. **Divorce**—Endangering Health.—A man cannot obtain a divorce from his wife on the ground that her profane and abusive language endangered his health.—Moir v. Moir, Iowa, 165 N. W. 1001.

39. **Dower**—Seisin.—Where land of which a husband dies seised is subject to a valid oil and gas lease yielding rental, widow is dowable of the reversion and rent as an incident of the reversion.—Campbell v. Lynch, W. Va., 94 S. E. 739.

40. **Druggists** — Warranty. — Where defendant manufacturing chemist sold to a veterinary hog cholera virus and serum for use on hogs, and he used it on plaintiff's hogs, which were thereby killed, the defendant was not an insurer of the remedy if administered according to directions, especially where it specifically warned of the dangerous character of the substance.—Brown v. H. K. Mulford Co., Mo., 199 S. W. 582.

41. **Election**—Domicile.—Where one during the life of his parents married and moved out of the ward, his prima facie domicile was the ward to which he moved and to keep his domicile in his ancestral ward for purpose of voting, his intent to return must be based on something more definite than intent to return "if things turned out as he thought they would," under Pub. St., 1901, c. 31, § 9.—Felker v. Henderson, N. H., 102 Atl. 623.

42. **Electricity** — Contributory Negligence.— Painter, employe of contractor to paint iron stack, who rested ladder on roof of power company's substation, where there were exposed power wires, held guilty of negligence contributing to his death by shock.—Chartier v. Barre Wool Combing Co., Mass., 118 N. E. 263.

43. **Eminent Domain**—Special Damages.—In an action by a corner lot owner for special damages on account of the street railway track constructed close to the curb along the line of the lot, it was improper to admit evidence of the jar occasioned by passing street cars; such inconvenience being common to all.—Fairchild v. Oakland & B. S. Ry. Co., Cal., 169 Pac. 388.

44. **Fish**—License.—Where privilege of carrying on business of growing oysters was granted town licenses by selectman under act of Legislature, until objection is made by commonwealth, and forfeiture insisted on by it, canal company cannot rely on violation of Rev. Laws, c. 91, § 107, as to assignment of license, as excuse for refusing compensation for injuries to fisheries.—Henshaw v. Boston, Cape Cod & New York Ship Canal Co., Mass., 118 N. E. 276.

45. **Fraud**—Damages. — Where a purchaser buys what the vendor states to be 112.5 acres of land at $50 per acre and there are only 78.76 acres, the vendee can recover the excess paid in an action for fraud, even though he sold the same for as much as he paid without knowledge of the shortage.—Purdy v. Underwood, Ore., 169 Pac. 536.

46. **Fraudulent Conveyance**—Oral Agreement. —Where an insolvent advertiser, in order to get his printing done, orally agreed to turn over sufficient account accruing each month to pay for printing for that month, and the agreement was carried out and the accounts collected, there is no fraud on creditors, no matter how vague the agreement, or that creditors had no notice.—Potter v. American Printing & Lithographing Co., Iowa, 165 N. W. 1044.

47. **Gas**—Res Ipsa Loquitur.—That gas escaped from a pipe in street would not establish liability of defendant gas company, and therefore doctrine of res ipsa loquitur was inapplicable.—Di Sandro v. Providence Gas Co., R. I., 102 Atl. 617.

48. **Gift**—Inter Vivos.—Though donor is afflicted with incurable malady, and knows he cannot get well, where gift is made to take effect immediately on delivery to donee, gift is inter vivos, though donor may be upon deathbed.—Harmon v. Harmon, Ark., 199 S. W. 553.

49.——Promissory Note.—Where one gave note payable on demand, as a gift, the object being to leave the payee money by note instead of by will, it is not good as a "gift inter vivos."—Wood v. Sturges, Miss., 77 So. 186.

50. **Grand Jury**—Composition of.—Socialists held denied no constitutional or statutory rights because grand jury was composed exclusively of members of other parties and of property owners.—Ruthenberg v. United States, U. S. S. C., 38 S. Ct. 168.

51. **Highways** — Obstruction.—In prosecution for obstructing cartway, in absence of evidence of dedication, or of adverse continuous user by prosecuting witness, defendant could not be guilty, where obstruction was on road where it crossed his land.—State v. Lance, N. C., 94 S. E. 721.

52. **Insurance** — Cancellation. — Insurance agent, requested to "place" insurance on property, without indicating the companies, held authorized, without notice given, to cancel one policy on the request and to issue another in its stead, where insured did not insist on five days' notice of cancellation.—Hartford Fire Ins. Co. v. McKinley, Fla., 77 So. 226.

53.——Damages.—General rule as to loss recoverable under Massachusetts standard fire policy for partial destruction is difference between value of building before fire and value of part remaining.—Second Society of Universalists in Town of Boston v. Royal Ins. Co., Mass., 118 N. E. 292.

54.——Estoppel.—In applicant for credit insurance did not see fit to read applications or conditions of policies to which applications referred, rights of parties are not affected.—Cauman v. American Credit Indemnity Co. of New York, Mass., 118 N. E. 259.

55.——Evidence Allunde.—Where words "manufacturing, handling, or shipping" of stock of lumber manufacturing plant in policy were of doubtful application, extrinsic evidence was admissible to show true meaning of parties.—Mountain Timber Co. v. Lumber Ins. Co. of New York, Wash., 169 Pac, 591.

56.——Fidelity Bond.—That liability may attach to a fidelity bond conditioned against larceny or embezzlement of an employe, it is not necessary for employer to put in evidence

sufficient to convict of "larceny" or "embezzlement" as defined by state laws.—National Surety Co. v. Williams, Fla., 77 So. 212.

57.——Iron Safe Clause.—A complaint in an action on an insurance policy, averring that defendant instructed plaintiff that he need not comply with the portion of said policy known as the "iron-safe clause," was sufficient, without alleging when, how, or by whom the instruction was given.—Cohen v. Home Ins. Co., Del., 102 Atl. 621.

58.——Notice of Injury.—Accident policy requiring notice of injury within 30 days, unless insured was unconscious or disabled, is not breached by insured's failure to give such notice during some 7 days following accident, before plaintiff became physically disabled.—Kendall v. Travelers' Protective Ass'n of America, Ore., 169 Pac. 751.

59.——Special Agent.—Where agent of credit insurance company represented himself to one who desired to secure insurance as special agent, person desiring insurance was bound to acertain nature and extent of authority.—Cauman v. American Credit Indemnity Co. of New York, Mass., 118 N. E. 259.

60.——Total Disability.—That traveling salesman injured by railroad collision continued his journey and made a second journey two days later did not as matter of law show that his disability was not immediately total within terms of accident insurance contract.—McKay v. Minnesota Commercial Men's Ass'n, Minn., 165 N. W. 1061.

61.——Waiver.—A provision in a policy of life insurance that no conditions could be waived except by indorsement by certain officers cannot effect the waiver of a condition in the application that the policy should not take effect until the premium was paid.—Whipple v. Prudential Ins. Co. of America, N. Y., 118 N. E. 211, 222 N. Y. 30.

62. **Internal Revenue** — Stock Dividend.—A stock dividend is "capital" for the purpose of the Income Tax Act of 1913 and is not taxable as "income," as the interests of the stockholders are not thereby increased; the only change being in the evidence representing that interest.—Towne v. Eisner, U. S. S. C., 38 S. Ct. 158.

63. **Joint Adventures** — Participant.—Where attorney for committee of promoters was a participant in the joint enterprise, held that he must stand his proportionate share of value of his services.—In re Marvin, N. Y., 168 N. Y. S. 555.

64. **Landlord and Tenant**—Constructive Eviction.—Where lessor of store and family suites collected rent from lessee's tenants, and gave them notice forbidding them to pay further rent to lessee, latter was not constructively evicted or ousted.—Aguglia v. Cavicchia, Mass., 118 N. E. 283.

65.——Eviction.—The prosecution to judgment of unlawful detainer by a landlord, without malice, was not an eviction entitling the tenant, on reversal, to damages, where no writ to dispossess was issued, and tenant moved in compliance with judgment.—Black v. Knight, Cal., 169 Pac. 382.

66.——Damages. — On breach of landlord's covenant to make repairs, measure of damages is difference between rental value of premises as they were, and what it would have been had they been put and kept in repair.—Murrell v. Crawford, Kan., 169 Pac. 561.

67.——Lease.—In a building lease providing that the basement was to be "properly waterproof," the term "waterproof" is a relative expression, meaning that the walls and floor of the basement were to be so constructed as to keep out water and dampness under such circumstances and weather conditions as might have been reasonablely anticipated.—Ozark Grocery Co., v. Crandall, Ark., 199 S. W. 551.

68. **Libel and Slander**—Malice.—Publication of libel or slanderous charge of adultery creates legal presumption that charge was false and made without legal excuse—that is, with malice—and plaintiff, in absence of proof of truth of charge or that it was privileged communication, may recover general damages.—Craney v. Donovan, Conn., 102 Atl. 640.

69. **Livery Stable and Garage Keepers**—Damages.—Statement by one who hired taxicab in response to driver's question that hospital to which she desired to go was out H. street on B. avenue, was not direction that he should return on H. street, so as to preclude recovery for injuries received while so returning.—Hathaway v. Coleman, Cal., 169 Pac. 414.

70. **Mandamus**—Ballot by Soldier.—Where soldier had right to vote in certain district, but by mistake his ballot was sent to another district, mandamus will lie to compel delivery of such ballot to proper board, and canvass and return thereof by such board.—People ex rel. Fiske v. Inspectors of Election of Certain Districts of City of Mt. Vernon, N. Y., 168 N. Y. S., 398.

71. **Master and Servant**—Involuntary Servant. —Silence of owner of automobile, even if implied assent to terms of hire by bailee, who proposed that, if he put on his driver, owner would have to be responsible, was insufficient to make driver involuntary servant of owner.—Melchionda v. American Locomotive Co., Mass., 118 N. E. 265.

72.——Safe Place to Work.—While a master may perform his duty of furnishing reasonably safe place for work by use of mechanical device, yet if such device require human agency to render place safe, master is bound to provide such agencies, and otherwise fails to render place reasonably safe.—Weber v. Webster City, Iowa, 165 N. W. 1009.

73.——Scope of Employment.—An employe in a wood working mill held not to have been within the scope of his employment in taking a fire extinguisher and climbing a ladder to another room in which there was a fire, but to have acted as a volunteer and defendant owed him no duty.—Delano Mill Co. v. Osgood, U. S. C. C. A., 246 Fed. 273.

74.——Warning.—In case of a yardmaster killed, while standing between two tracks, by a car switched onto one of them striking him, no negligence is shown; the usual warning by a halloo being given by several as soon as any one had reason to think there was danger. —Healy v. Erie R. Co., N. J., 102 Atl. 629.

75.——Workmen's Compensation.—Where the master had not elected to come under the Workmen's Compensation Act, a servant was injured by falling down stairway, allegations that she was familiar with stairway, knew it was usually lighted and where light was, and could have had the light turned on, come within defenses of assumption of risk and contributory negligence, and were foreclosed to the master by section 1, pt. 1.—Wulff v. Bossler, Mich., 165 N. W. 1048.

76. **Mines and Mineral**—Coal in Place.—Ten-year lease of land and specific vein of coal therein, with mining rights, without warranty of acreage or quantity of coal, providing payment of certain price per ton mined, and guaranteeing a minimum payment, was a sale of coal in place on condition of removal within term.—National Coal Co. v. Overholt, W. Va., 94 S. E. 735.

77. **Municipal Corporations** — Emergency.—Under municipal ordinance requiring standing vehicles to be not more than two feet distant from the curb, except in emergency, where of only 22 feet in which to stand his vehicle, and intended to alight and move the wheels of the buggy over to the curb, there was such emergency that, in an action for injuries when his buggy was struck by defendant's automobile, it was improper to refuse instruction that he was guilty of negligence if any wheel on the plaintiff, driving up to the curb, had a space curb side was more than two feet from the curb.—Collins v. Marsh, Cal., 169 Pac. 389.

78. **Negligence**—Employers' Liability Act.—Contributory negligence of injured employe is not a defense under Employers' Liability Act, where employer, by violating statute enacted for safety of employes, contributed to injury or death; in other cases contributory negligence is not complete defense.—E. L. Bruce Co. v. Yax, Ark., 199 S. W. 535.

79. **Partnership** — Contract. — Where one bought a herd of cattle and turned them over to another, who was to feed them three years at his own expense, the title to remain in the former and the proceeds of all sales to go to the former until he was reimbursed, and then remainder to be divided equally, there was no partnership, within Rev. Codes, § 5466; no such intention existing.—McCormick v. Stimson, Mont., 169 Pac. 726.

80. **Physicians and Surgeons** — Practicing Medicine.—Where plaintiff stated she could remove superfluous hair, and undertook to treat condition with electric needle, she "practiced medicine" without being licensed physician, thus violating Public Health Law, art 8, and could not recover any balance due.—Engel v. Gerstenfeld, N. Y., 168 N. Y. S. 434.

81. **Principal and Agent**—Mutual Mistake.—Where trust company executed assignment of mortgage, and its solicitor fraudulently inserted description of an additional mortgage and collected the amount due on both mortgages, there was a mutual mistake, and assignee might rescind and recover of trust company the whole amount paid to the solicitor.—Hubing v. Liberty Trust Co., N. J., 102 Atl. 636.

82.——Ratification.—Where a car was placed with an agent for sale for $800 cash, and the agent exchanged the car and got $50 cash, and sent $400 to the principal telling him he had exchanged and received that amount on the trade, which the principal accepted conditionally, there was no ratification of the exchange, where there was no connection shown between the $50 and the $400, and the principal did not know with whom the car had been exchanged, or the conditions.—Hutchinson v. Scott, Magner & Miller, Cal., 169 Pac. 415.

83.——Ratification—Where one ordered material on the credit of another without authority, and the latter did not repudiate the bill for six months after learning thereof, and during such delay the time for filing a lien on the work expired, the account is ratified.—Northwestern Lumber Co. v. Cornell, Wash., 169 Pac. 590.

84. **Railroad** — Consolidation.—A consolidation of railroad companies which has been in effect for 20 years unchallenged by the authorities of the states concerned will not be held invalid as against the laws of such states in a suit between private parties.—Railway Steel Springs Co. v. Chicago & E. I. R. Co., U. S. D. C., 246 Fed. 338.

85.——Crossing Accident.—That an automobile driver, familiar with a railroad crossing where the view was somewhat obstructed, could have stopped a safe distance from the track, stilled noise of the automobile engine and listened, but failed to do so, was, as matter of law, contributory negligence barring recovery for injury to the automobile.—Rayhill v. Southern Pac. Co., Cal., 169 Pac. 718.

86. **Receivers**—Attorney at Law.—A lawyer appointed as receiver is expected to act as his own counsel, except under extraordinary circumstances.—Bailey v. Glormine, N. J., 102 Atl. 634.

87. **Reformation of Instruments**— Obvious Mistake.—Where there is no obvious mistake requiring correction to make all parts of instrument harmonious, court of law will read it as written, and will not reform it by exercising functions of court of equity.—Kimble v. City of Newark, N. J., 102 Atl. 637.

88. **Sales**—Breach of Contract.—In action for breach of contract for sale of welding machine by placing other machines in same county, proof of profits from welding work done by other machines was admissible in estimating plaintiff's damages.—Lewistown Iron Works v. Vulcan Process Co., Minn., 165 N. W. 1071.

89.——Evidence.—A letter, "We want the rest of those bottles as soon as you can send them in, and see no valid reason why you should be holding them," written in December, to which there was no reply, or action taken, forecloses any claim by the buyer that he did not know until March that the sellers had breached their contract, and hence the market price in March cannot be considered in fixing damages for non-delivery.—Schultz v. Glickstern, N. Y., 168 N. Y. S. 490.

90.——Identifying Property.—A sale of "50 tailenders" of a herd of about 400 cattle sufficiently identified the property to be conveyed.—Adams v. Guiraud, Colo., 169 Pac. 580.

91.——Speculative Damages.—In action for purchase price of machinery, purchaser could not claim damages sustained by reason of nonuser of capacity of its plant as a whole during canning season, due to defects in certain machinery; such damages being speculative and not in contemplation of the parties.—Burrell v. Southern California Canning Co., Cal., 169 Pac. 405.

92. **Specific Performance**—Unsigned Memoranda.—Where under an unsigned memoranda of lease defendants went into possession, and made improvements under promise of the execution of a lease, they cannot enforce specific performance where the memoranda left for future settlement, terms and payment of rents, leveling of land, and purchase of plaintiffs' implements.—Durst v. Jolly, Cal., 169 Pac. 449.

93. **Street Railroads**—Look and Listen.—Where plaintiff before crossing street car track looked first to the south and saw a car, and then to the north, but did not look again before crossing, and was struck, he was guilty of contributory negligence as a matter of law.—Hubbard v. Atlantic Coast Electric Ry. Co., N. J., 102 Atl. 632.

94. **Telegraphs and Telephones**—Notification to Sender.—A telegraph company is not liable for failure to notify sender of receipt of message by addressee except in case of repeated message.—Western Union Telegraph Co. v. Hazlehurst Oil Mill & Fertilizer Co., Miss., 77 So. 187.

95. **Tender**—Place of.—Where a note gave the option of paying money or delivering property at maturity, the money payable at a certain bank, but nothing being said as to place of delivery of the property, the depositing of the property at the bank to be delivered to the payee was a good tender.—Hennessy v. Wooding, Mo., 199 S. W. 564.

96. **Trust**—Laches.—Suit brought 40 years after issuance of railroad bonds secured by mortgage and 10 years after maturity to charge another railroad company with personal liability as trustee as having succeeded to the mortgagor's lands, held barred by laches.—Waller v. Texas & P. Ry. Co., U. S. S. C., 38 S. Ct. 142.

97.——Notice.—Firm of shoe manufacturers, who, with notice of lack of authority in testator's son and widow to continue retail shoe business, sold them goods, held not entitled to a proportionate part of fund by impressing trust on proceeds of entire stock sold by administrators de bonis non.—Donnelly v. Alden, Mass., 118 N. E. 298.

98.——Parol Evidence.—Where a mother delivered to her son a sum of money, and orally instructed him to hold and disburse for her support, to pay her debts during her lifetime, and, after her decease, the debts of her estate, and to divide the remainder among certain parties named, a trust by parol was created in favor of the beneficiaries.—McElveen v. Adams, S. C., 94 S. E. 733.

99. **Vendor and Purchaser**—Notice of Lien.—Where purchaser before maturity, etc., of notes given partly for purchase price of land, had knowledge by recitals therein that vendees, husband and wife, occupying premises as a homestead, gave deed to vendor, who in turn deeded to husband, held purchaser was entitled to judgment for full amount of notes, but only to lien on premises for amount owing on land at date notes were executed.—Thomas v. Ash, Tex., 199 S. W. 670.

100. **Wills**—Expert Testimony.— Permitting expert whose opinion would naturally have much weight to express opinion as to whether man in testator's condition lacked ability to comprehend and understand disposition of property by will, held prejudicial.—In re Jahn's Will, Iowa, 165 N. W. 1021.